

1 THE HON. RONALD B. LEIGHTON
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7 UNITED STATES DISTRICT COURT
8 FOR THE WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 **CHINOOK INDIAN NATION**, an Indian Tribe
11 and as successor-in-interest to The Lower
12 Band of Chinook Indians; **ANTHONY A.**
13 **JOHNSON**, individually and in his capacity as
14 Chairman of the Chinook Indian Nation; and
15 **CONFEDERATED LOWER CHINOOK TRIBES**
16 **AND BANDS**, a Washington nonprofit
17 corporation,

18 Plaintiffs,

19 v.

20 **DAVID BERNHARDT**, in his capacity as
21 Secretary of the U.S. Department of Interior;
22 **U.S. DEPARTMENT OF INTERIOR; BUREAU**
23 **OF INDIAN AFFAIRS, OFFICE OF FEDERAL**
24 **ACKNOWLEDGMENT; UNITED STATES OF**
25 **AMERICA; and TARA KATUK MAC LEAN**
26 **SWEENEY**, in her capacity as Acting Assistant
Secretary – Indian Affairs,

Defendants.

Case No. 3:17-05668-RBL

**PLAINTIFFS' MOTION FOR PARTIAL
SUMMARY JUDGMENT RE: CLAIMS VI-
VIII**

ORAL ARGUMENT REQUESTED

*(Note on Motion Calendar for:
December 27, 2019)*

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT COMPLAINT RE: CLAIMS VI-VIII - 1
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1 **Introduction**

2 Congress decreed in 1789 that

3 [T]he utmost good faith shall always be observed towards Indians;
 4 their land and property shall never be taken from them without their consent;
 5 and, in their property, rights, and liberty, they shall never be invaded or
 disturbed,

6 Northwest Ordinance of 1789, sec. 14, Art. 3. Defendants and their predecessors negotiated
 7 treaties with the Chinook and other tribes for their lands in 1851.¹ Congress never ratified
 8 those treaties, but Defendants took the Chinook lands by force anyway. Some 60 years later,
 9 in 1912, Congress appropriated money, in the mid-nineteenth century dollar amounts
 10 specified in the 1851 treaties with the Lower Bank of Chinook and Clatsop, to pay for the
 11 taken lands from them at about 51 cents an acre.² Act of August 24, 1912, 37 Stat. 518 at
 12 546.

13 After World War II, admitting that prior compensation had been inadequate,
 14 Congress created the Indian Claims Commission (“ICC”), which finally adjudicated, in 1971,
 15 an additional \$48,692.02 (64 cents an acre) toward the promise of “utmost good faith.”
 16 Defendants hold those finally adjudicated 1971 ICC funds in trust for plaintiffs. 25 USC
 17 1401(b).

18 Seven years later, in 1978, Congress established an administrative system for
 19 formally recognizing Indian tribes. 25 CFR Part 83.³ Defendants continued treating
 20 Plaintiffs’ funds as held in trust for them. Plaintiff Chinook Indian Nation (“CIN”) was denied
 21 formal federal recognition under the 1978 Act in 2002. Defendants’ Answer, ¶¶ 14, 15.

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23 ¹ The 1851 Treaties were signed by the Chinook (the Lower Band of Chinook, Wahkiakum, Kathlamet, Willapa and Clatsop) but never ratified by Congress. The Chinook refused to sign an 1855 Treaty as it would have required them to relocate to the land of their enemy, the Quinault Indian Nation.

24 ² The Chinook got \$39,000 for 76,630 acres of land.

25 ³ Before the 1978 Act, 549 tribes had been recognized by other means. Under the 1978 Act, 17 additional tribes have been recognized. AR000242-44

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1 Defendants continued holding CIN's funds in trust and sending plaintiffs accountings of their
 2 trust funds until 2015, when it first took the position that, because plaintiff CIN was not
 3 federally recognized, the adjudicated funds could no longer be held for its benefit.

4 Plaintiffs filed their Sixth, Seventh and Eighth Claims for relief in this action for
 5 violation of the Administrative Procedures Act ("APA") and for violation of procedural and
 6 substantive due process of law, respectively. Defendants moved to dismiss, and the Court
 7 denied those motions, but did dismiss Claim I. Plaintiffs recently moved the court for partial
 8 summary judgment regarding Claims II-V (Dkt. #101) following the filing of Defendants'
 9 Motion for Partial Summary Judgment regarding those same claims (Dkt. #97). Plaintiffs
 10 now move the Court for summary judgment, to grant the remaining relief requested in their
 11 complaint – a declaration that the Chinook trust funds are and shall be held by Defendants
 12 in trust for Plaintiff CIN.⁴

13 **A. Summary Judgment and the APA Standard**

14 **1. The Facts**

15 A federal district court "shall grant summary judgment if the movant shows that there
 16 is no genuine dispute as to any material fact and the movant is entitled to judgment as a
 17 matter of law." Fed.R.Civ.P. 56(a). Because judicial review of administrative action is limited
 18 to the administrative record, and the administrative agency is the only finder of fact, the only
 19 question concerning the facts is whether the agency could reasonably have found the facts it
 20 did on the record. *Occidental Engineering Co. v. Immigration & Naturalization Service*, 753
 21 F.2d 766, 769-70 (9th Cir. 1985).

22 There is no dispute as to the facts concerning Plaintiffs' trust fund claim. Plaintiffs'
 23 ICC land claim was finally adjudicated in their favor; their trust funds were treated as theirs
 24

25
 26 ⁴ Plaintiffs do not ask that the Court award them the trust funds themselves. Disbursement
 of funds adjudicated by the ICC requires specific Congressional appropriation. P.L. 93-134,
 87 Stat. 466 (1973); *See* 25 CFR Part 87.

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1 from 1971 to at least 2012; they were denied recognition in 2002; and they were told in 2015
 2 for the first time that their trust funds were no longer theirs. For the reasons discussed
 3 herein, Plaintiffs are entitled to judgment as a matter of law.

4 **2. The Law**

5 The APA requires a federal district court to "hold unlawful and set aside agency
 6 action, findings, and conclusions found to be—(A) arbitrary, capricious, ... or otherwise not
 7 in accordance with law [or] (C) in excess of statutory jurisdiction, authority, or limitations,
 8 or short of statutory right ." 5 U.S.C. § 706(2)(A),(C). As discussed below, the agency's
 9 decision to stop holding Plaintiffs' trust funds in trust for them violates each of these
 10 standards.

11 **B. Not in accordance with law**

12 Defendants are required to hold ICC-adjudicated funds, with interest, in trust for "any
 13 Indian tribe, band, group, pueblo, or community . ." 25 USC 1401(a). This requirement is
 14 not subject to formal tribal recognition under the 1978 Act. Indeed, section 1401 specifies
 15 that the funds are to be held in trust for any "band, group, pueblo or community" in addition
 16 to "tribes." Defendants' explanation of its decision not to hold Plaintiffs' ICC funds in trust
 17 for Plaintiffs violates 25 USC 1401. Defendants contend that

18 Acknowledgement of tribal existence by the Department [BIA] is a
 19 prerequisite to the protection, services and benefits of the Federal
 government available to Indian tribes by virtue of their status as tribes.

20 Thus, because you are not recognized, the funds held with our office cannot
 21 benefit your tribe.

22 Coon Dec, Exhibit A, DN-001590 (Rugen letter, August 25, 2015). Defendants' obligation to
 23 hold Plaintiffs' ICC funds in trust for them is not "protection, services and benefits of the
 24 Federal government available to Indian tribes *by virtue of their status as tribes.*" (emphasis
 25 added). As above, the trust fund obligation runs to any "band, group, pueblo or community"
 26 holding an ICC adjudication. 25 USC 1401. "Status as [a] tribe[]]" is not required. Defendants'

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1 decision is not in accordance with 25 USC 1401, thus it violates the APA.

2 **C. The agency's change of position was arbitrary, capricious and**
 3 **unsupported by any evidence.**

4 From the creation of the Indian Claims Commission in 1946 through the first decade
 5 of the 21st Century, it was clear that a tribe, whether recognized by the federal government
 6 or not, was entitled to compensation for the lands taken from it in 19th Century treaty
 7 negotiations. As above, the law was and is that ICC trust funds must be held for any "tribe,
 8 band, group, pueblo or community." Many documents in the record the government has
 9 produced show that the agency did not take the position that federal recognition was
 10 required until sometime in 2011 or 2012 when an arbitrary and unexplained change
 11 occurred.

12 The statute that created the Indian Claims Commission (ICC) authorized presentation
 13 of claims for the taking of Indian land "by any member of an Indian tribe, band, or other
 14 identifiable group of Indians as the representative of all its members." 25 USC 70i
 15 (repealed).⁵ It did not require federal recognition, though, if recognized, a tribe was to be
 16 the exclusive representative of its members. *Id.* The ICC found the Chinook to "have the
 17 capacity and the right to assert claims for their respective lands" and, in 1970, awarded them
 18 compensation in the case denominated "Docket 234." 6 Ind. Cl. Com. 229a. No other
 19 representative of the Chinook has ever received an ICC award for Chinook lands.

20 **1. The Agency's Original Policy and Practice**

21 Defendants proceeded from that 1971 ICC adjudication as if the funds were indeed
 22 held in trust for the Chinook through the rest of the twentieth century and for the first decade
 23 of the twenty-first. The administrative denial of federal recognition in 2002 had no effect on
 24

25 _____
 26 ⁵ The 1973 disbursement statute provides for appropriations to pay land claims awards to
 "any Indian tribe, band, group, pueblo, or community." 87 Stat. 466 (1973). As above, 25 USC
 1401 reprises that language.

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1 the agency's apparent view that the Chinook were entitled to these funds, adjudicated by the
 2 ICC as payment for the admitted taking of their ancestral lands. Coon Declaration, Exhibit B
 3 DN-001422 (October 17, 1980 letter from agency to Chinook apologizing for delay in paying
 4 adjudicated funds); *Id.*, Exhibit C, DN-001452 (October 11, 1984, agency proposal for
 5 handling of funds if tribe is recognized and if not); *Id.*, Exhibit D, DN-001463 (April 21, 1997,
 6 agency is "fiduciary for funds held in trust for both federally recognized tribes and non-
 7 federally recognized tribes"); *Id.*, Exhibit E, DN-001529 (January 20, 2006 agency memo
 8 requesting "Chinook Tribe" "assistance to determine whether the tribe's assets ... should
 9 remain as invested or be allocated to longer-term investments" and listing "your tribe's
 10 account balances" as \$247,868.77).

11 2. The Agency's Policy Changes

12 For the first time in 2011, the administrative record Defendants have produced
 13 begins to include language suggesting that the lack of federal recognition might affect the
 14 tribe's right to their funds. For example, on May 26, 2011, Catherine Rugen, Regional Trust
 15 Administrator sent an email saying, "[W]e are in the process of initiating a project to change
 16 the statements for all non-federally recognized tribes to file copy only." *Id.*, Exhibit F, DN-
 17 001546. That may suggest a decision to change the rules about handling and payment of
 18 trust funds by stopping the practice of sending trust fund accountings to affected tribes, yet
 19 it is not supported by any rationale or documented statutory, regulatory, or policy change.
 20 The record Defendant has produced includes no documented description of the "process of
 21 initiating a project" to which Ms. Rugen referred. Still, 10 months later, on March 20, 2012,
 22 BIA fiduciary trust officer Gino Orazi, new to the Olympic Peninsula Agency, wrote then
 23 "Chinook Nation" Tribal Chairman Ray Gardner to set up a meeting to discuss, with the
 24 Chinook "Tribal Council or members of your Tribe" among other matters, "your Tribes' Trust
 25 Accounts or any other Trust related issues," suggesting that the Chinook indeed had trust
 26 accounts with the agency. *Id.*, Exhibit G, DN-001551. However, on May 7, 2012, Mr. Orazi

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1 sent an internal email that included the following concerning the Chinook Trust Account:

2 The Tribe is not recognized for federal purposes. Please discontinue all
 3 statements being published and mailed to the Tribe ASAP, please set up a file
 4 copy only statement. I am letting Cathy know by CC to this message since we
 5 recently had communication concerning all Tribal accounts which were not
 6 publishing a statement.

7 *Id.*, Exhibit H, DN-001560. The administrative record does not include any of the
 8 “communication concerning all Tribal accounts” to which Mr. Orazi refers. There is nothing
 9 to explain the apparently sudden realization that the Chinook, for whom federal recognition
 10 had been denied more than 10 years before, in 2002, should no longer receive statements
 11 concerning the trust account the agency had held in their name for more than forty years.

12 **3. The policy change was arbitrary and capricious.**

13 The idea that the agency would no longer hold the Doc. 234 funds in trust for the
 14 Chinook appeared out of nowhere. Nothing in the record supports the policy change as a
 15 matter of evidence or explains or justifies it as a matter of administrative reasoning. The
 16 change exemplifies “arbitrary and capricious” decision-making. *Organized Vill. of Kake v. U.S.*
 17 *Dep’t of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015) (“Unexplained inconsistency” between
 18 agency actions is a “reason for holding an interpretation to be an arbitrary and capricious
 19 change.”) quoting *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981
 20 (2005).

21 If an agency policy change is to comply with the APA, the agency must

22 (1) display[] “awareness that it is changing position,” (2) show[] that
 23 “the new policy is permissible under the statute,” (3) “believe[]” the
 24 new policy is better, and (4) provide[] “good reasons” for the new
 25 policy, which, if the “new policy rests upon factual findings that
 26 contradict those which underlay its prior policy,” must include “a
 27 reasoned explanation . . . for disregarding facts and circumstances
 28 that underlay or)were engendered by the prior policy.” *Id.* at 515-
 29 16 (emphasis omitted).

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1 *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009), quoted in *Organized Village*
 2 *of Kake, supra*, 795 F3d at 966. Defendant's change of policy concerning the Chinook trust
 3 fund fails to meet these four requirements:

4 **a. Policy Change Awareness.** While the agency described an intent to "change the
 5 statements" for Plaintiffs' trust fund, the agency made no statement that it was changing its
 6 policy as to whether the funds continued to belong to the Chinook. When Ms. Rugen stated
 7 for the first time, in her August 25, 2015 letter to CIN Chairman Plaintiff Tony Johnson, that
 8 "because you are not recognized, the funds held with our office cannot benefit your tribe,"⁶
 9 her letter showed no awareness that the agency was changing its position of more than four
 10 decades.

11 **b. Not Permissible under the Statutes.** There was no credible showing that the
 12 new policy was "permissible under the statutes." The explanation that, because the Chinook
 13 had not been recognized, their trust fund could not be held for their benefit was not
 14 explained and contradicted more than four decades of policy to the contrary, as well as the
 15 statutes on which the ICC award was based. As above, it flatly violated 25 USC 1401.

16 **c. No Belief in Better Policy.** Defendants did not say they believed the new policy
 17 was better as a matter of policy. They claimed only that it was required by statute, though,
 18 as above, they made no effort to explain why they had always acted as if the policy were just
 19 the opposite.

20 **d. No Good Reason.** Defendants did not "provide good reasons" for the new policy.
 21 They provided no reason at all beyond a cursory reference to their reading of the statute,
 22 which patently contradicted the original statutes that authorized the award and 25 USC
 23 1401, which they ignored. They made no effort to explain why they had interpreted the law
 24 differently for over forty years.

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⁶ Coon Dec, Exhibit I, DN-001589.

1 Defendants' decision to stop sending trust fund statements to Plaintiffs and, by necessary
 2 implication, to stop holding Plaintiffs' trust funds in trust for them, was arbitrary and
 3 capricious and in violation of law.

4 **4. No one else claims or can claim the CIN trust funds.**

5 Nowhere in the administrative record is there any evidence that any claimant other
 6 than the Chinook was involved in the ICC "Docket 234" process or has made any credible
 7 claim on the CIN trust funds. According to the record, no other entity, group or individual
 8 has received agency accounting or correspondence, or otherwise been treated since the ICC
 9 award as the lawful beneficiary of the ICC judgment. And going forward, Defendants'
 10 position prohibiting "repetitioning" would ensure that no other claimant could ever gain
 11 access to those funds. Defendant's repetitioning rule specifies that

12 groups that previously petitioned and were denied Federal acknowledgment
 13 under these regulations or under previous regulations in part 83 of this title,
 14 may not be acknowledged under these regulations. This includes reorganized
 15 or reconstituted petitioners previously denied, or splinter groups, spin-offs, or
 16 component groups of any type that were once part of petitioners previously
 17 denied.

18 25 CFR 83.3(f). If, as Defendants claim, federal acknowledgment of the tribe is required for
 19 funds to be held in trust for that tribe, and if, as the repetitioning regulation provides, no
 20 related groups "of any type" can ever be acknowledged, then there is no one who can ever
 21 claim the Chinook trust funds. The effect of the government's new policy is thus to nullify
 22 the ICC award and take back the funds promised and awarded under the 1946 legislation to
 23 compensate for the taking of treaty lands.

24 **B. Defendants' action violates due process of law.**

25 The Indian Claims Commission ("ICC") was set up by statute in 1946 to address Indian
 26 claims that tribes had received "unconscionable consideration" for the taking of their

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1 ancestral lands.⁷ Federal recognition of a tribe was not required for an Indian group to
 2 pursue its claims before the Commission. The statute provided that:

3 Any claim within the provisions of this chapter may be presented to the
 4 Commission by any member of an Indian tribe, band, or other identifiable
 5 group of Indians as the representative of all its members; but wherever any
 6 tribal organization exists, recognized by the Secretary of the Interior as having
 7 authority to represent such tribe, band, or group, such organization shall be
 accorded the exclusive privilege of representing such Indians, unless fraud,
 collusion, or laches on the part of such organization be shown to the
 satisfaction of the Commission.

8 25 USC 70i (repealed) (emphasis added). The statute specifically allowed for claims by "any
 9 member" of any "identifiable group of Indians as the representative of all its members,"
 10 though, if there was a tribe recognized by the Secretary, that tribe would be the exclusive
 11 representative. Plainly, a claimant need not have been a federally recognized tribe to be
 12 entitled to present a claim.

13 The Chinook duly presented a claim for compensation for the taking of their ancestral
 14 lands, which the Commission considered as "Docket 234." 6 Ind. Cl. Com. 177ff. The
 15 commission entered an Interlocutory Order April 16, 1958 finding that the Chinook and
 16 Clatsop Tribes "had Indian title" to ancestral lands, that the United States "assumed definite
 17 control" over those lands in 1851, and "that said Indian tribal groups have the capacity and
 18 the right to assert claims for their respective lands" describe in the Commission's findings. 6
 19 Ind. Cl. Com. 229a.⁸ A final order affirming the ICC decision was entered by the Court of
 20 Claims in 1971. *Chinook Tribe and Bands of Indians*, 1971 U.S. Ct. Cl. LEXIS 40 * | 196 Ct. Cl.
 21 780.

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23 ⁷ The statute, 60 Stat. 1050, 25 USC 70a *et seq.*, was enacted because of tribal members'
 24 contributions to the World War II effort. The statute was repealed, and the ICC abolished,
 25 with remaining claims transferred to the Court of Claims effective September 30, 1978, 90
 Stat. 1990 (1976).

26 ⁸ The quoted decision is found in the Oklahoma State University online library,
<http://digital.library.okstate.edu/icc/v06/icc06p229a.pdf> at 6 Ind Cl Com 229a, though
 the page number that appears on the document itself is "6 176a."

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When the Chinook made and pursued their claims before the ICC in the 1950s to the 1970s, there was no administrative process for the recognition of Indian tribes. Accordingly, federal recognition was not required to assert a claim. Tribes were, or were not, recognized by the BIA, *ad hoc*. *E.g. Samish Indian Nation v. U.S.*, 419 F3d 1355, 1359 (Fed. Cir. 2005) (Bureau of Indian Affairs' operative list of recognized tribes made by BIA employee without authority.) The precursor to the current administrative system of recognition was first implemented in 1978, seven years after the ICC's final adjudication of the Chinook land claim award in Docket 234. The administrative rule on which Defendants now rely for their assertion that funds cannot be held in trust for Plaintiffs is 25 CFR 83.2,⁹ which was promulgated under the authority of the 1978 statute. In any event, Defendants sent Plaintiff trust fund accounting statements for their adjudicated funds at their tribal offices until 2015, when Ms. Rugen's letter first asserted that the law required otherwise.

13 1. Procedural Due Process (Seventh Claim)

14 Defendants' 2015 change of policy to deny Plaintiffs the trust funds held for their
 15 benefit since they were adjudicated in 1971 violates procedural due process because it
 16 purports to deprive Plaintiffs of the benefit of their adjudicated trust funds without any
 17 process at all. It points to a later-enacted statute and regulation and declares that Plaintiffs'
 18 trust funds can no longer be held for their benefit.

19 The degree and timing of process that is due in order for the government to take away
 20 benefits may depend on many factors. *e.g. Goldberg v. Kelly*, 397 U.S. 254 (1970). As argued
 21 below, benefits that have already been subject to final adjudication cannot be taken away by
 22 any means whatever. As a matter of procedure, however, there is no authority for the
 23 proposition that valuable, adjudicated benefits may be taken away with no process at all.

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 26 9 "Federal recognition: a) Is a prerequisite to the protection, services, and benefits of the
 Federal Government available to those that qualify as Indian tribes and possess a
 government-to-government relationship with the United States;"

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1 Defendants' arbitrary decision to reverse more than four decades of practice and a Court of
 2 Claims final adjudication based on an internal policy change without any process, violated
 3 procedural due process of law.

4 **2. Substantive Due Process (Eighth Claim)**

5 Defendants' change of policy to deny Plaintiffs the benefit of the trust funds held for
 6 them since they were adjudicated in 1971 violated substantive due process because funds,
 7 once adjudicated in favor of a party by a final judgment in a United States court, vest and may
 8 not be taken away. Once the judicial process has adjudicated a final result, neither Congress,
 9 nor any administrative agency, can reach back and nullify that result. The Chinook have had
 10 a vested property right in their final judgment for fair compensation for their ancestral lands
 11 since that judgment became final in 1971.

12 It is not within the power of a legislature to take away rights which have been
 13 once vested by a judgment. Legislation may act on subsequent proceedings,
 14 may abate actions pending, but when these actions have passed into judgment
 the power of the legislature to disturb the rights created thereby ceases.

15 *McCulloch v. Virginia*, 172 U.S. 102, 123-24 (1898). Similarly here, the Chinook Tribe's 1971
 16 judgment cannot be taken away by later legislative or administrative action. *See also Chicago*
 17 & *Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 113 (1948); *Hodges v.*
 18 *Snyder*, 261 U.S. 600, 603 (1923) ("the private rights of parties which have been vested by
 19 the judgment of a court cannot be taken away by subsequent legislation, but must be
 20 thereafter enforced by the court regardless of such legislation"); *Stephens v. Cherokee Nation*,
 21 174 U.S., 445, 478 (1899) ("it is undoubtedly true that legislatures cannot set aside the
 22 judgments of courts").

23 The Chinook obtained a final, unreviewable judgment from Defendants' ICC and the
 24 Court of Claims in 1971, based on a statute that allowed them to represent their people
 25 whether or not they were a federally recognized Tribe. It would be a violation of due process
 26 of law for Congress or the Secretary to withhold those adjudicated funds in reliance on

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1 legislation or administrative rulemaking done after that final adjudication.

2 **CONCLUSION**

3 According to Defendants' position, the United States, by later changing the rules,
4 should be allowed to take back the money it earlier promised to pay Plaintiffs for lands it
5 took from them by force in the nineteenth century. To understate the matter, that would not
6 be consistent with the Congressional promise that "the utmost good faith shall always be
7 observed towards Indians; their land and property shall never be taken from them without
8 their consent." Northwest Ordinance of 1789, sec. 14, art 3. There is no question of material
9 fact, and, based on the administrative record, Plaintiffs are entitled to a declaration that the
10 moneys awarded to them in the ICC Docket 234 process, with interest, are and shall be held
11 in trust for them by Defendants, subject to disbursement according to law.

12 DATED: November 26, 2019.

13 **THOMAS COON NEWTON & FROST**

14 By:s/ James S. Coon

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